SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1072

JOSEPH A. RICCHETTI, et al.,
Petitioners,

vs.

MEISTER BRAU, INC., a corporation,
Respondent.

Brief for Respondent in Opposition to Petition for Writ of Certiorari

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OPINIONS BELOW

The opinion of the Court of Appeals is reported in 431 F.2d 1211 and appears as Appendix D to the Petition. The only opinion of the District Court appears in its order, which is reproduced as Appendix A to the petition.

JURISDICTION

The District Court had jurisdiction under 15 U.S.C. § 26, the Court of Appeals under 28 U.S.C. § 1291, and this Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

Contrary to the statement in the petition, this case involves only Sections 7 and 16 of the Clayton Act which are quoted in Appen-

dix E of the petition. Although the petitioners' complaint in the District Court also referred to the Sherman Act, in both that court and in the Court of Appeals petitioners abandoned all claims under that Act. (See p. 7 *infra*).

QUESTIONS PRESENTED

None of petitioners' five questions is presented. Petitioners' questions 1, 2 and 4 ignore contrary factual determinations made below, and petitioners' questions 3 and 5 were not urged below.

The only question that can possibly be crystallized out of the record is this:

Where a manufacturer exercises its right to select its customers, and its conduct in that respect is not otherwise unlawful, does it become unlawful under Section 7 of the Clayton Act solely because the manufacturer had theretofore acquired assets from another corporation in an acquisition which itself did not violate Section 7? Are the principles governing one's right to determine to whom to sell altered by the fact that it has acquired assets from another corporation, particularly when that acquisition is not in violation of Section 7, and is a refusal to select petitioners as customers a violation where the reason for the refusal is the petitioners' incompetence and inadequacy as distributors?

STATEMENT OF THE CASE

A. The Proceedings Below

This case started as an application for an interlocutory but mandatory injunction. From the District Court's denial of that injunction, plaintiffs appealed.[1] Because the hearing on that application in the District Court had not been based merely on affidavits but took the form of a full dress trial with 11 witnesses testifying in open court and the receipt of over 44 exhibits, the Court of Ap-

1. On that appeal petitioners unsuccessfully sought injunctions pending appeal from the Court of Appeals and then from Mr. Justice Douglas. (Pet. p. 9.)

peals inquired of counsel whether the matter was not ripe for submission to the trial court for final determination. Agreeing that this was the proper course, the parties returned to the District Court and presented to it a written stipulation submitting the cause for final decision on the record already made (1 R. 82). The trial court then entered its final judgment of dismissal of the case (Pet. App. C). From that judgment petitioners appealed, and the Court of Appeals affirmed.

The petition complains that the trial court made no findings (Pet. 8, fn. 5, 44, fn. 28). But that complaint treats this Court with less candor than propriety requires. The "Stipulation Submitting the Cause for Final Decision" expressly provided that "the Court is requested to and may forthwith determine whether the permanent injunction prayed for by the plaintiffs shall or shall not be granted, *the parties waiving findings of fact and conclusions of law*" (1 R. 83).[2] By handwritten interlineation the stipulation referred to the findings contained in the previous order denying a preliminary injunction. When the stipulation was presented in open court, the District Court specifically noted for the record the provision waiving findings.[3] Thus the parties stipulated that no findings additional to those already contained in the prior order were necessary. It is elementary that all subordinate facts which the evidence will support are deemed incorporated in the findings already made.

B. The Nature of the Case

Before November 17, 1969, the Jos. Schlitz Brewing Company made beer in California and sold it under a brand called "Burgermeister". In 1966, in a suit brought by the United States under

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2. A copy of the stipulation is attached to this brief as Appendix A.

3. Transcript, March 3, 1970, p. 4: "THE COURT: I take it that the findings are waived as indicated in the formal stipulation?
MR. BERTAIN: That's correct.
MR. HAAS: That is correct, your Honor."

Section 7 of the Clayton Act, the trial court below ordered Schlitz to divest itself of the assets used to make that beer, *United States v. Jos. Schlitz Brewing Company*, 253 F.Supp. 129, 183, this Court affirmed the judgment, *United States v. Jos. Schlitz Brewing Co.*, 385 U.S. 37 (1966), and the cause was remanded for supervision of divestiture to an unobjectionable buyer.

Thereafter, in July, 1969, the District Court, in the *Schlitz* case, directed Schlitz to sell "the Burgermeister assets" to respondent Meister Brau, the order stating that the United States had represented to the Court that it had "considered the plan and that * * * [it] believes that the purpose of the Final Judgment and Decree to protect the public interest in free and open competition and against any violation of Section 7 of the Clayton Act will be served by consummation of the proposed plan of sale." (Ex. 20). Among the assets sold was the trade name "Burgermeister". Meister Brau, the sole defendant in the present case, is a small brewer. Its sales constitute but 8/10ths of 1% of the beer sold in the United States (Complaint, ¶ 10, 1 R. 5). It has never brewed or sold "Burgermeister" anywhere, has never brewed any beer in California and holds none of the permits or licenses which would be required for it lawfully to do so (1 R. 34). The only beer it ever sold in California was a dietetic beer called "Lite", the sales of which constituted 5/100ths of 1% of the beer sold in California (Complaint, ¶ 10, 1 R. 5). Meister Brau has never had any business arrangement with any of the petitioners.[4]

In September, 1969 Meister Brau incorporated Burgermeister Brewing Corporation, a wholly owned subsidiary (1 R. 33-34), which is not a party to this action. On November 17, 1969, three days after this action was filed, Burgermeister Brewing Corporation obtained the permits and licenses required of brewers by the State of California and began manufacturing beer under the "Burger-

4. Except that some eight months before the complaint was filed, Meister Brau sold a quantity of "Lite" brand beer to appellant Rossi, for which Rossi has still not paid. 1 R. 34; 4 R. 17, 19.

meister" brand in the San Francisco brewery formerly owned by Schlitz (1 R. 34). Before that date Burgermeister Brewing Corporation had sold no beer to anyone and had no distributors because it had nothing to distribute. It terminated no relationships with petitioners because it never had any relationships with them (1 R. 33-34). As petitioners stated in their opening brief in the Court of Appeals (pp. 47-48):

> "Admittedly there had been no relationship between Meister Brau (or its subsidiary Burgermeister Brewing Corporation) and the appellants."[5]

Before beginning brewing operations on November 17, 1969, Burgemeister Brewing Corporation's management evaluated possible wholesalers as prospective customers, including those theretofore buying "Burgemeister" brand beer from Schlitz. Based on these evaluations, Burgermeister Brewing Corporation decided to select as its customers (distributors) all but eight of the some 145 wholesalers who had bought from Schlitz (4 R. 30). Among the eight not selected were the three petitioners.[6] The nature and bases of these evaluations were covered at length in the evidence. (E. g., 1 R. 36-56; 3 R. 97-106; 4 R. 5-25, 87-100; 5 R. 1-53,

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5. Petitioners have had relations with Schlitz as purchasers from it, but nothing in the order directing Schlitz to sell "the Burgermeister assets" required that the purchaser assume Schlitz's agreements with its distributors. Indeed, insofar as the three petitioners are concerned, there was nothing to assume, for Schlitz sold to them under agreements terminable at the will of either party. (Exhibit 22; 2 R. 98; 4 R. 61; 5 R. 148; Petition, p. 15, fn. 8.)

6. Presumably relying on the complaint's averment of a class action (1 R. 4), the petition assumes that all eight of these distributors are petitioners here. (Pet. pp. 25-26). An action is not a class action until the trial court determines that it is to be so maintained (F. R. Civ. Proc. Rule 23(c)(1)), and eight persons do not constitute a class "so numerous that joinder of all members is impractical." (F. R. Civ. Proc. Rule 23(a)(1)). The trial court did not determine that the action was a class action. On the contrary, when this matter was called to its attention, the court directed counsel to "confine your activity to the named Plaintiffs" (2 R. 35). There are, accordingly, only three petitioners, Ricchetti, Rossi and Bay Beverage.

58-71). As the Court of Appeals concluded, there was ample evidence from which the District Court could properly have found that petitioners' physical facilities, transportation equipment, personnel and past sales records were unsatisfactory (Pet. App. D, xi.)[7]

Petitioners do not contest this evidence or these findings. They argue, instead, that the reasons why they were not selected as distributors by Burgemeister Brewing Corporation are "irrelevant" (Pet. 44, fn. 28), i.e., that the trial court was required to appoint petitioners as "Burgermeister" distributors no matter how incompetent they were.

The purpose of petitioners' suit was to obtain a mandatory injunction to compel Meister Brau to sell "Burgermeister" beer to petitioners for so long as it lacked "good cause" not to do so and for 90 days thereafter, although Meister Brau does not make or sell that beer at all. In denying the interlocutory injunction the District Court found (1 R. 59):

> "(a) That there are no equitable considerations which would prompt this Court to grant injunctive relief herein;
> ***
> "(c) That there is no asserted *status quo* to preserve allegedly existing between plaintiffs and defendant. Plaintiffs' motion for preliminary injunction seeks to impose a *new* status as between the parties."

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7. For example, petitioner Rossi was long overdue on a bill he owed Meister Brau (1 R. 34, 4 R. 17, 19) for "Lite" beer, his physical facilities were sub-standard and "in-house" controls were poor (4 R. 52; 5 R. 68). Petitioner Ricchetti operated at a loss in both 1967 and 1968 (2 R. 85), his sales of "Burgie" were off 25% (1 R. 41; 2 R. 81) and the route he attempted to cover was so large that his driver salesmen, attempting to serve 700 accounts (2 R. 76-77), "don't say hello to their first account until they have driven an hour and a half." (2 R. 79) Petitioner Bay Beverage, after seven years as a beer distributor, was $300 further behind than when it started (4 R. 71) and its "Burgie" sales were off 20%-26% (4 R. 77; 43).

C. Petitioners' Theory

Although the complaint referred to Sections 1 and 2 of the Sherman Act, *all such claims were abandoned in the District Court and in the Court of Appeals.* Nothing was said about the Sherman Act to the trial court in final argument by petitioners' counsel (5 R. 199-213),[8] and petitioners' opening brief in the Court of Appeals stated (p. 4): "Only the alleged violation of Section 7 of the Clayton Act is presented on this appeal."

Section 7 (15 U.S.C. § 18) prohibits certain *acquisitions*, but petitioners have never contended that the acquisition from Jos. Schlitz Brewing Company of the assets used to make "Burgermeister" beer violated Section 7. Their opening brief in the Court of Appeals stated (p. 35):

> "appellants did not contend at the District Court nor do they contend now that the acquisition of the Burgermeister assets as approved by Judge Weigel on July 23, 1969, violated § 7."

They could hardly have done so. By the order of divestiture in *United States v. Jos. Schlitz Brewing Company, supra,* a small brewer entered California to compete with the national brewers already established there. As the vice president of Burgermeister Brewing Corporation saw it, "we felt that under the most ideal conditions, we had a tough task ahead of us. And we felt that we had to field the best team." (5 R. 86) Petitioners were not considered "best team" material and, accordingly, others were selected as distributors for the new "Burgermeister". This selection process is the essence of competition, and to compel the new market entrant to appoint incompetent distributors would emasculate the effectiveness of the divestiture proceedings.

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8. Petitioners' only submission to the trial court was that "we contend that the elimination of these eight distributors, your Honor, will have such an effect at the market place as to arise to a violation of Section 7 of the Clayton Act." 5 R. 199.

DISCUSSION

The foregoing statement is enough to show the absence of anything warranting the grant of the writ. A new manufacturer selects its own customers. It is not claimed that it would have violated any law in doing so, if it had not acquired its assets from another. It is not even claimed that the acquisition violated Section 7 of the Clayton Act. What is claimed is that because it had acquired the assets from another, its selection of its customers somehow came under Section 7. This is a novel theory, and we tried to articulate it in an intelligible question in our statement of the question presented. (p. 2 supra) The rule petitioners espouse is to the effect that every business decision of any corporation is to be tested by Section 7 of the Clayton Act if only that corporation has previously-acquired assets from another corporation, however unassailable and unassailed that acquisition is. If, for example, a corporation having no prior connection with the beer industry were to buy a parcel of land from another corporation also having no connection with the beer industry, all management decisions respecting the disposition of beer brewed in a brewery located on the land would be regulated under Section 7.

Actually, however, not even that question crystallizes out of the facts and findings in this case. Any Section 7 inquiry involves examination into markets. But here the record does not show the area of any relevant market or the share of any market enjoyed by any brewer or wholesaler.[9] There are numerous beers in California and scores of wholesalers distributing them.[10] The case boils down simply to a claim that, in an industry described by a witness of petitioners' as "highly competitive" (5 R. 168), one or

9. Petitioners simply assert that King and Tulare counties, the City of Long Beach, certain other cities in Los Angeles County, and San Francisco are "markets" (Pet. 32, fn. 18) and elsewhere array supposed statistics which are no part of the record. (E.g. Pet. 27)

10. A partial list, furnished by the petition itself, includes Blatz, Budweiser, Carling, Coors, Eastside, Falstaff, Hamm's, Michelob, Millers, Lucky Lager, Olympia, Pabst, Rainier and Schlitz, all well known brands.

two wholesalers out of a group of hundreds may find it difficult to stay in business unless a court directs Meister Brau to sell "Burgermeister" to them.[11]

Yet even that claim is one which the trial court did not credit and was well warranted in not crediting. Thus petitioner Ricchetti still distributes "Schlitz", "Falstaff" and "Pabst" beers, "Rainier" ale and wine as well (2 R. 53). Petitioner Rossi has been in business 28 years (5 R. 187); in 1968 he made $18,445, no part of which came from sales of "Burgermeister" because he had not even begun to sell that beer (obtained by him from the Schlitz Company) until May of 1969 (5 R. 186), and he still has "Hamm's", "Schlitz", "Rainier" ale and numerous other beers to distribute (1 R. 51). Mr. Straley, the owner of petitioner Bay Beverage, has a successful trucking business (4 R. 71, 73), he had no difficulty shifting customers from "Burgie" to "Falstaff" which he also distributes (4 R. 53, 74-76), and he was unwilling to express any clearcut opinion on what effect not having the new "Burgermeister" would have on him (4 R. 59). Petitioners argue the facts as if in a trial court; but the trial court resolved any conflicts, drew the permissible influences, and reached its conclusions about credibility.[12]

Moreover, even had the trial court found a violation, it would not have issued the injunction demanded by the petitioners and would not have been required to do so. Petitioners invoked the trial court's jurisdiction solely under 15 U.S.C. § 26 (Pet. 5-6), and the only remedy sought was a mandatory injunction com-

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11. The petition asserts (p. 28) that the trial court excluded one exhibit supposed to show a trend to concentration. In fact, the trial court permitted the exhibit to be read into the record (5 R. 156-163). The witness who did so then testified that the industry was "highly competitive." (5 R. 168).

12. As petitioners' counsel noted in the trial court: "I feel that on the questions of credibility, and on the various matters the witnesses have testified to, your Honor is the best judge of that. You listened to it and saw the witnesses, and I will not comment upon that testimony." (5 R. 213).

manding respondent to sell them "Burgermeister" beer for an indefinite future time and then to continue to sell "Burgermeister" to whomever petitioners chose as their successors in order to enable them to sell a supposed "Burgermeister distributorship".[13]

15 U.S.C. § 26 (Clayton Act, § 16) authorizes the issuance of injunctions "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings." Under these rules, final injunctive relief does not automatically follow a violation of a federal statute, for issuance is discretionary with the chancellor, *Hecht Company v. Bowles*, 321 U.S. 321, 329 (1944), and particularly so as respects the extraordinary remedy of a *mandatory* injunction. *Moor v. Texas & N.O.R. Co.*, 297 U.S. 101, 105 (1936). Even after being adjudged an unlawful price fixer under the Sherman Act, a manufacturer need not be required to sell to all comers and be thus deprived of the right of customer selection. *United States v. Bausch & Lomb*, 321 U.S. 707, 728 (1944). Apart from all other considerations, the trial court was thus well justified in concluding that the hostility manifested by the petitioners toward respondent would make harmonious business relations impossible.[14]

This case is thus a poor one in which to present the novel legal proposition that one's right of customer selection is less than

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13. The complaint casts the prayer in the negative, as for a decree enjoining respondent "from terminating plaintiffs as Burgermeister distributors except for good cause, with at least 90 days' advance notice and the opportunity for plaintiffs to sell their Burgermeister distributorship to an acceptable purchaser" (1 R. 11). However, there were no "distributorships" to terminate, as none existed. The relief sought was mandatory, to create a relationship and give it tenure.

14. E.g., (2 R. 97) In the papers filed in this Court and in the Court of Appeals in connection with the first appeal, petitioners charged respondent, among other things, with "unconscionable" and "nefarious" conduct, with a "distributors be damned" attitude, with a "callous disregard" of distributors and with "gross incompetence and mismanagement." Application for Stay of Injunction Pending Appeal to the United States Court of Appeal for the Ninth Circuit, Exhibit F, pp. 11, 12, 15, 21, 24.

ordinary if one has theretofore acquired assets by a lawful acquisition. In fact, no decision of this or any other court remotedly suggests any support for that legal theory. Certainly *United States v. E. I. du Pont de Nemours & Company*, 353 U.S. 586 (1957) does not. Petitioners refer to its holding that whenever an acquisition reveals its anticompetitive effects, it may be undone, even though the revelation occurs well after the acquisition. The basis of that rule is that Section 7 deals with incipiencies and probabilities; whenever the acquisition demonstrates that it has worked anticompetitively, it is shown that the incipiency and probability were present at the time the acquisition occurred.

As held below, we have here simply a case where, with neither conspiracy nor monopoly, a manufacturer has chosen its own customers. We submit that the court below correctly stated the law in holding (Pet. App. D, xii):

> "Where, as here, a supplier seeks no more than a better equipped and more aggressive distributor for his product, his conduct may in fact be more beneficial than detrimental to competition, and is not condemned by either the Sherman or Clayton Acts. As the antitrust laws do not prohibit a business from fairly entering into a competitive market, neither do they prohibit its improvement of its competitive stature in the product market."

CONCLUSION

We respectfully submit that the petition should be denied.

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Appendix A

STIPULATION SUBMITTING CAUSE FOR FINAL DECISION

Plaintiffs having heretofore moved for a preliminary injunction requiring defendant Meister Brau, Inc. to sell "Burgermeister" brand beer to plaintiffs for resale pending adjudication of the merits of plaintiffs' complaint and the Court having, on November 18, 19, 21, 24 and 25, 1969, held a hearing on plaintiffs' said motion, receiving evidence both oral and documentary, and the Court having, on November 26, 1969 made its order denying plaintiffs' said motion *and entered its findings** and plaintiffs having appealed from said order to the United States Court of Appeals for the Ninth Circuit, and the parties having there indicated a willingness to agree that the order of this Court denying a preliminary injunction be considered a decree denying a permanent injunction, and the Court of Appeals having, on February 25, 1970, given its Advice to Counsel, of which Exhibit A hereto is a copy,

IT IS HEREBY STIPULATED, by and between the parties hereto, that this suit is now submitted to Honorable George B. Harris, Chief Judge of this Court, on the entire record made before the Court on the hearing of plaintiffs' motion for a preliminary injunction, for final decision, and the Court is requested to and may forthwith determine whether the permanent injunction prayed for by plaintiffs shall or shall not be granted, the parties waiving findings of fact and conclusions of law.

IT IS HEREBY FURTHER STIPULATED, by and between the parties hereto, that each of the parties reserves the right to appeal to the United States Court of Appeals for the Ninth Circuit from any final decree which this Court may make, and that in the event

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*The italicized words were inserted in handwriting and initialed by counsel (1 R. 82).

that either party should so appeal, the appeal shall be immediately submitted to said United States Court of Appeals upon the record and the briefs now before the Court in its Matter No. 28,123.

Dated: March 3, 1970.

G. JOSEPH BERTAIN, JR.
TIMOTHY H. FINE
By G. JOSEPH BERTAIN, JR.

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